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ORIGINAL

MAY 17 1993

Before the
FEDERAL COMMUNICATIONS COMMISSION FEDERAL COMMUNICATIONS COMMISSION
Washington DC 20554 OFFICE OF THE SECRETARY

timely because it is being filed within fifteen days after

case, the maximum statutory amount is \$25,000. See 47 U.S.C. §503(b)(2)(A).

II. Background

When Brent signed her application on November 13, 1991, she certified in Section III of the application that "sufficient net liquid assets are on hand...to construct and operate the requested facilities for three months without revenue."² Rita Brent and her husband, Robert Brent, were listed as the sources of the \$180,000 needed to construct and to operate her proposed station.

Brent filed her application on the June 1989 version of FCC Form 301. The instructions to that form make clear that an applicant must have on hand certain documentation at the time a financial certification is made. The pertinent portions of those instructions are submitted as Attachment 2 to this petition. For applicants who are relying upon their own funds, the applicant must have on hand certain documentation at the time a financial certification is made. The pertinent portion of those instructions are submitted as Attachment 2 to this petition. For applicants who are relying upon their own funds, the applicant must have on hand a detailed balance sheet and a statement showing the yearly net after-tax income received by the applicant from any source. For other individuals who have agreed to provide funds, the

² Pertinent portions of Brent's application are submitted as Attachment 1 to this petition.

applicant must have, on hand, a balance sheet or financial statement showing (1) all liabilities and current and liquid assets sufficient to meet current liabilities, (2) the financial ability to provide the requested funds, and (3) net after-tax income for the past two years.

Section 1.325(c)(1)(v) of the Commission's rules required all applicants in this proceeding to produce "all bank letter and other financing documents with the dollar amounts unexpurgated..." When Brent's initial document production did not contain any financing documents, Huber filed a "Motion to Compel Production of Documents" on April 16, 1993, seeking an order requiring Brent to produce such documents. A copy of the pertinent portion of the motion is submitted as Attachment 3 to this petition. The motion makes clear that Huber was seeking the financial documents described in the instructions to FCC Form 301.

Brent filed a "Partial Opposition to Motion to Compel Production of Documents" on April 27, 1993, which was received by the undersigned on April 30, 1993. A copy of the pertinent portion of the Brent pleading is submitted as Attachment 4 to this petition. On page 2 of the pleading, Brent admitted:

She does not have any financing documents which would be subject to production under subparagraph (c)(1)(v).

Although Brent is not holding any documents not previously produced...

The unambiguous meaning of that language is that Brent was "not holding" (i.e., did not have) any of the documents requested by Huber.³

Analysis

In 1989, the Commission modified its procedural requirements for financial qualifications in response to the large number of applicants who were abusing the Commission's processes by filing applications when they were financially unqualified and/or falsely certifying that they were financially qualified. Revision of Application for Construction Permit for Commercial Broadcast Station, 4 FCC Rcd 3853, 66 RR 2d 519, 528-529 (1989). The Commission first modified the form to require applicants to list each source they were relying upon for construction and operation funds. The Commission then went on to require that applicants have financial documentation on hand at the time they are financially qualified. In the Commission's words:

We emphasize that we are not returning to our pre-1981 reporting requirements, and we are not requiring the applicant to submit underlying documentation to verify its cost estimate or funding sources. However, as we did prior to 1981, we are

³ The Presiding Judge denied Huber's motion by Memorandum Opinion and Order, FCC 93M-231 (released May 7, 1993). The discoverability of these documents under the standard comparative issue is irrelevant to this petition. The critical fact is that such documents do not exist.

In her opposition, Brent criticized Huber for not producing balance sheets or other such documents. Attachment 4, P. 2. Her argument ignores the fact that Huber is relying upon a bank letter to establish her financial qualifications.

now requiring that the applicant have such information and documentation on hand at the time it submits the application. We stress that when the applicant checks the box on Form 301 that it is financially qualified, it must have at that time sufficient liquid assets in excess of current liabilities and/or sufficient funds available from committed sources of construct and operate the facility. To provide guidance to the applicants on compiling the estimate and on the funding information an applicant will now be required to have on hand at the time it files an application, we are adding to our current instructions in Section III of Form 301 the instructions formerly used by the Commission to elicit financial qualifications information and documentation.

⁶⁸...Pursuant to these instructions, documentation that establishes an applicant's financial qualifications includes, among other things, a balance sheet of the applicant; net income statements for the past two years; ~~itemization of all applicant's deposits; financial~~

certification. Brent did not have that prerequisite, and a financial qualifications issue must therefore be specified.

Brent must be distinguished from the applicants that filed their applications on pre-1989 versions of Form 301. Applicants that filed on the earlier versions of FCC Form 301 did not need to have documentation on hand when they certified if they had other reliable evidence that funds would be available. Compare Northampton Media Associates, 4 FCC Rcd 5517, 66 RR 2d 1246 (1989), with Northampton Media Associates v. FCC, 941 F.2d 1214, 69 RR 2d 750 (D.C. Cir. 1991). Almost all of the Review Board and Commission case law on financial qualifications concerns applicants filing on the earlier versions of Form 301. In Brent's case, however, there is no exception to the documentation requirement. She may not rely upon cases dealing with pre-1989 applicants to explain away her failure to meet the Commission's requirements.

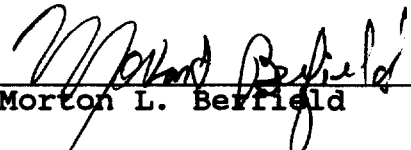
A false certification issue must also be specified. The instructions to FCC Form 301 are "plain English words." In RKO General, Inc. (WAXY-FM), 4 FCC Rcd 4679, 66 RR 2d 1162, 1173-1174 (Rev. Bd., 1989), an applicant's financial certification was found to be a misrepresentation because.

documentation. Brent had also hired an experienced communications counsel who was well aware of those requirements. Under these circumstances, a prima facie case has been established that Brent either knew that her certification was false or that she acted in willful disregard of the Commission's requirements.

Accordingly, Huber asks the Presiding Judge to grant her "Petition to Enlarge Issues."

Respectfully submitted,

MARTHA J. HUBER

By 
Morton L. Berfield

By 
John J. Schauble

Cohen and Berfield, P.C.
1129 20th Street, NW, #507
Washington, DC 20036
(202) 466-8565

Its Attorneys

Date: May 17, 1993

SECTION III - FINANCIAL QUALIFICATIONS

NOTE: If this application is for a change in an operating facility do not fill out this section.

1. The applicant certifies that sufficient net liquid assets are on hand or that sufficient funds are available from committed sources to construct and operate the requested facilities for three months without revenue.

☒ Yes ☐ No

2. State the total funds you estimate are necessary to construct and operate the requested facility for three months without revenue.

\$ 180,000.00

3. Identify each source of funds, including the name, address, and telephone number of the source (and a contact person if the source is an entity), the relationship (if any) of the source to the applicant, and the amount of funds to be supplied by each source.

Source of Funds (Name and Address)	Telephone Number	Relationship	Amount
Rita and Robert Brent 2106 St. Andrews Road Jeffersonville, Ind. 47130	(812) 283-7886	Applicant/ Husband	\$180,000.00

**Instructions for FCC 301
Application for Construction Permit for Commercial Broadcast Station
(FCC Form 301 attached)**

GENERAL INSTRUCTIONS

A. This FCC form is to be used to apply for authority to construct a new commercial AM, FM or TV broadcast station, or to make changes in the existing facilities of such a station. It consists of the following sections:

- I. GENERAL INFORMATION
- II. LEGAL QUALIFICATIONS
- III. FINANCIAL QUALIFICATIONS
- IV-A. PROGRAM SERVICE STATEMENT
- IV-B. INTEGRATION STATEMENT
- V. ENGINEERING DATA AND ANTENNA AND SITE INFORMATION
- VI. EQUAL EMPLOYMENT OPPORTUNITY PROGRAM
- VII. CERTIFICATIONS

An applicant for change in facilities need file only Sections I, V and VII. Do not file Sections II, III, IV-A, IV-B and VI.

B. Many references to FCC Rules are made in this application form. Before filling it out, the applicant should have on hand and be familiar with current broadcast rules in 47 Code of Federal Regulations (C.F.R.):

- (1) Part 0 "Commission Organization"
- (2) Part 1 "Practice and Procedure"
- (3) Part 17 "Construction, Marking and Lighting of Antenna Structure"
- (4) Part 73 "Radio Broadcast Services"

FCC Rules may be purchased from the Government Printing Office, Washington, D.C. 20402. You may telephone the GPO Order desk at (202) 783-3238 for current prices.

C. Prepare an original and two copies of this form and all exhibits. This application with all required exhibits should be filed with the FCC's Washington, D.C. office in accordance with 47 C.F.R. Section 0.401.

D. By law, the Commission is required to collect charges for certain of the regulatory services it provides to the public. Generally, applicants seeking to construct a new commercial AM, FM or TV broadcast station or to make changes in the authorized facilities of such a station are required to pay and submit a fee with the filing of the application. See 47 C.F.R. Section 1.1112. A listing of the required charges is set forth in 47 C.F.R. Section 1.1104. Full payment of the required fee may be made by check, bank draft or money order payable to the Federal Communications Commission. An application submitted with an insufficient payment or with an inappropriate form of payment will be returned, along with the tendered payment, to the applicant without processing. Except for the limited circumstances enumerated in 47 C.F.R. Section 1.1111, an accepted fee payment will be retained by the

Section 310 of the Communications Act has been interpreted with respect to limited partnerships to prohibit equity contributions or voting interests of alien limited partners, which in the aggregate exceed 20% in a broadcast licensee or which in the aggregate exceed 25% in a partnership which holds a controlling interest in a broadcast licensee. The interests held by aliens in a licensee through intervening domestically organized limited partnerships can be determined by multiplication of any intervening insulated interests in the manner set forth above with respect to corporate applicants, except that insulated limited partnership interests exceeding 50% may be multiplied rather than considered as a 100% interest. However, the multiplier is not used in calculating the limited partnership link in the ownership chain UNLESS the applicant is able to certify that the alien partner is effectively insulated from active involvement in the partnership affairs. For example, see Instruction A, above.

The applicant must determine the citizenship of each officer and director. It must also determine the citizenship of each shareholder or else explain how it determined the relevant percentages. For large corporations, a sample survey using a recognized statistical method is acceptable for this purpose.

- E. Commission policies and litigation reporting requirements for broadcast applicants have been revised with a view to focusing on misconduct which violates the Communications Act or a Commission rule or policy and on certain specified non-FCC misconduct which demonstrates the proclivity of an applicant to deal truthfully with the Commission and to comply with its rules and policies. The categories of relevant non-FCC misconduct include: (1) misrepresentations to any other governmental unit resulting in criminal or civil violations; (2) criminal convictions involving false statements or dishonesty; (3) certain felony convictions; and (4) adjudicated violations of anticompetitive or antitrust laws that are broadcast related. The parameters of the revised policies and requirements are fully set forth in Character Qualifications, 102 FCC 2d 1179 (1985), reconsideration denied, 1 FCC Rod 421 (1986).

INSTRUCTIONS FOR SECTION III - FINANCIAL QUALIFICATIONS

- A. All applicants filing Form 301 must be financially qualified to effectuate their proposals. Certain applicants (i.e., for a new station, to reactivate a silent station, or if specifically requested by the Commission) must demonstrate their financial qualifications by filing Section III. DO NOT SUBMIT Section III if the application is for changes in operating or authorized facilities.
- B. An applicant for a new station must attest it has sufficient net liquid assets on hand or committed sources of funds to construct the proposed facility and operate for three months without additional funds. In so certifying, the applicant is also attesting that it can and will meet all contractual requirements, if any, as to collateral, guarantees, donations, and capital investments. As used in Section III, "net liquid assets" means the lesser amount of the net current assets or of the liquid assets shown on a party's balance sheet, with net current assets being the excess of current assets over current liabilities.
- C. Documentation supporting the certification of financial qualifications need not be submitted with this application but must be available to the Commission upon request. The Commission encourages that all financial statements used in the preparation of this application be prepared in accordance with generally accepted accounting principles.
- D. (1)(a) The applicant must estimate the initial costs of constructing and operating the facility proposed in the application. The estimate for constructing the facility should include, but is not limited to, costs incurred for items listed below. In calculating costs for the items below, determine the costs for the items in place and ready for service, including amounts for labor, supervision, materials, supplies, and freight:

Antenna System (including antenna, antenna tower, transmission line, phasing equipment, ground system, coupling equipment and tower lighting);

RF Generating Equipment (including transmitter, tubes, filters, diplexer, remote control equipment, and automatic logger);

Monitoring and Test Equipment (including frequency monitor, modulation monitor, oscilloscope, dummy load, vectorscope, and video monitors);

Program Origination Equipment (including control consoles, film chains, cameras, audio tape equipment, video tape equipment, program and distribution amplifiers, limiters, and transcription equipment);

Acquiring Land;

Acquiring, Remodeling or Constructing Buildings;

Services (including legal, engineering, and installation costs); and

Other Miscellaneous Items (including mobile and STL equipment, non-technical studio furnishings, etc)

- (b) The estimate must also include the costs of operating the proposed facility for the first three months, including the costs of proposed programming, without relying on advertising or other revenues to meet operating costs. To arrive at an estimate of the total costs to be met by the applicant, the total construction costs should be added to the estimated cost of operation for three months.
- (2) The applicant must also identify, in the application, its sources of funding for the construction and operation of the proposed facility for the first three months. For each source of funding, the applicant must identify the source's name, address, telephone number, a contact person if the source is an entity, the relationship (if any) of the source to the applicant, and the amount of funds to be supplied by the source. The total amount of funds to be supplied by all the sources listed should equal or exceed the estimated cost of construction and operation computed in accordance with paragraph (1) and stated in the application in response to Question 2, Section III.

The funding sources listed on the application should include, if applicable: existing capital, new capital, loans from banks (identified separately), loans from others (identified separately), profits for existing operations, donations, and net deferred credit from equipment suppliers (identified separately and determined by deducting from the deferred credit the down payment, payments to principal, and interest payments). (Note: if the first equipment payment is due upon shipment, the applicant must include five monthly payments; if due in 90 days, four monthly payments; if due in 60 days, three monthly payments, etc.)

- (3) The applicant must also have on hand, at the time it files its application, BUT NEED NOT SUBMIT WITH THE APPLICATION, the following documentation:

- (a) For the applicant:

A detailed balance sheet at the close of a month within 90 days of the date of the application showing the applicant's financial position.

A statement showing the yearly net income, after Federal income tax, for each of the past two years, received by the applicant from any source.

- (b) For each person identified in response to Question 3, Section III, who has already furnished funds, purchased stock, extended credit, or guaranteed loans:

A copy of the agreement obligating the party to furnish funds, showing the amount furnished, the rate of interest, the terms of repayment, and security, if any.

- (c) For each person identified in response to Question 3, Section III, who has agreed to furnish funds, purchase stock, extend credit, or guarantee loans, a balance sheet or a financial statement showing:

All liabilities and current and liquid assets sufficient to meet current liabilities;

Financial ability to comply with the terms of the agreement to furnish funds, purchase stock, extend credit, or guarantee loans; and

Net income after Federal income tax, received for the past two years.

Note: If the statement does not indicate current and liquid assets sufficient to meet the proposed commitments, the financial statement must be supplemented by a statement showing how non-liquid assets will be used to provide the funds, and the extent to which such assets have liens or prior obligations against them.

- (d) For financial institutions or equipment manufacturers, identified in response to Question 3, Section III, who have agreed to make a loan or extend credit:

The document by which the institution or manufacturer has agreed to provide the loan or credit, showing the amount of loan or credit, terms of payment or repayment of the loan, collateral or security required, rate of interest to be charged, and special requirements (e.g., moratorium on principal or interest waiver of

STAMP & RETURN**RECEIVED**

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

APR 16 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of
MARTHA J. HUBER, et al.

For Construction Permit for a
New FM Station on Channel 234A
in New Albany, Indiana

)
) MM Docket No. 93-51
)
) File Nos. BPH-911114ME,
) et al.
)

TO: Honorable Richard L. Sippel
Administrative Law Judge

**MOTION TO COMPEL
PRODUCTION OF DOCUMENTS**

Martha J. Huber (Huber), by her attorneys, now asks the Presiding Judge to issue an order compelling Rita Reyna Brent (Brent) to provide the documents described in Section 1.325 (c) (1) (v) of the Commission's rules. Huber also requests that Brent be compelled to produce portions of a document for which she claimed privilege.

Financing Documents

Brent exchanged her standardized document production on April 9, 1993. In reviewing Brent's document production, Huber has noted the absence of financing documents that should have been produced. Huber is now asking the Presiding Judge to produce documents that should have been submitted with Brent's original document production.

Section 1.325(c) (1) (v) of the Commission's rules requires the production of "all bank letter and other financing

documents with the dollar amounts unexpurgated..." Section III of Brent's application (which is submitted as Attachment 1 to this motion), indicates that Brent is relying upon herself and her husband, Richard Brent, for \$180,000 in funds to construct and to operate her station.

When the Commission revised its FCC Form 301 in 1989 to curb the filing of applications by financially unqualified applicants, it required applicants to have certain documentation on hand when they certified to their financial qualifications. For applicants that are relying upon their own funds and funds from other individuals to construct and operate, these documents include:

a balance sheet of the applicant, net income statements for the past two years itemization of all applicant's deposits, financial statements for all persons who agreed to furnish funds, purchase stock, extend credit or guarantee loans...

Revision of Application for Construction Permit for Commercial Broadcast Station (FCC Form 301), 4 FCC Rcd 3853, 3868 n.68, 66 RR 2d 519, 529 n.68 (1989). When the Commission instituted the standardized document production procedure, it decided that the production of such financing documents was appropriate under the standard comparative issue. Such documents will help Brent's competitors discover the efforts undertaken by her to ascertain that she was financially qualified.

Despite the clear requirements imposed by the Commission's document production rule, Brent did not produce

any financing documents, nor did she provide any explanations why such documents were not being produced. The applicants who are relying upon bank letters in this proceeding have produced their bank letters, and there is no legitimate reason to insulate Brent from discovery because she is not relying



APR 30 1993

BOHEN & BERFIELD

Before The
Federal Communications Commission
 Washington, D.C. 20554

In re Applications of) MM Docket No. 93-51
)
MARTHA J. HUBER, et al.,)
)
 For Construction Permit for a)
 New FM Station on Channel 234A)
 in New Albany, Indiana)

TO: The Honorable Richard L. Sippel
 Administrative Law Judge

**PARTIAL OPPOSITION TO MOTION TO COMPEL PRODUCTION OF
 DOCUMENTS.**

Rita Reyna Brent ("Brent"), by her attorneys, respectfully responds to the Motion to Compel Production of Documents filed April 16, 1993, on behalf of Martha J. Huber ("Huber"). In support hereof the following is shown:

I. HUBER'S REQUEST FOR "FINANCING DOCUMENTS"

1. Huber avers that Brent failed to comply with 47 C.F.R. § 1.325(c)(1)(v) because she did not produce "any financing documents [or] provide any explanation why such documents were not being produced."¹ Huber defines "financing documents" to include balance sheets, spousal agreements concerning the provision of funds, and an itemization of joint bank deposits. See Mot. at 3. Huber argues that these categories of documents are subject to standard document production. Alternatively, she argues at note 1 that her Motion be treated as a supplemental document request under § 1.325(c)(3), which permits a party to seek "additional relevant documents, not called for in the Standard Document Production Order...."

¹ Brent is not relying on bank or other outside financing.

2. Brent has not failed to comply with § 1.325. She does not have any financing documents which would be subject to production under subparagraph (c)(1)(v).

3. Although Brent is not holding any documents not previously produced, she believes that it would be appropriate to comment briefly on the legal underpinnings of Huber's Motion. At page 2, Huber argues that when the Commission amended Section III of Form 301 by dropping the submission requirement, it envisioned that all of the documents identified in its Form 301 Instructions, and all of the documents mentioned in the text of its decision, would nevertheless have to be produced by litigants. There is absolutely no legal basis for Huber's position. She cites no authority for her sweeping assertion that, "When the Commission instituted the standardized document production procedure, it decided that the production of such financing documents was appropriate under the standard comparative issue." *Id.*² *Huber does not explain when and where the Commission made such a decision.* Indeed, Huber's position is contradicted by her own standard document production: Huber did not exchange *any* documents reflecting her estimates of initial costs of construction and operation. See *FCC Form 301* Instruction III, D(1)(a)-(b). Nor did she exchange her current balance sheet, *id.* at (3)(a), or divulge her net income for Federal income tax purposes for the two tax years preceding submission of her application in November 1991. *Id.* at (3)(b).³

² The "such" in Huber's sentence refers to balance sheets, net income statements, itemization of deposits, and other items listed in a footnote to *Revision of Application for Constr. Permit*, 4 FCC Rcd 3853, 3859 n. 68 (1989).

³ The Form 301 instructions require *all* applicants to prepare these documents regardless of how they plan to finance construction and operation. Huber's requests for "an itemization of deposits held by the Brents," and for "agreements between Ms. Brent and her husband concerning the provision of funds for her application," are clearly outside the ambit of standard document production. Nor are such documents relevant and thus subject to production under the supplemental document request subsection cited above.

APPENDIX RE DISCOVERY

If this petition to enlarge issues is granted, Huber will take the deposition of Rita Reyna Brent and Robert Brent. Huber also reserves the right to notice the deposition of any other person who had a role in determining whether Brent was financially qualified.

Huber also requests that Brent produce the documents listed

devices, or any other medium.

3. "Principal" includes all persons who hold a direct interest or an interest in any entity that has an interest in Brent's application, and all persons with a future right to acquire an ownership right in Brent's application.

4. "Related to" and "relating to" means contains, constitutes, embodies, pertains to, concerns, describes, arises from, emanates from, reflects, identifies, states, refers to, deals with, or is in any way pertinent to the specified subject.

10. Documents responsive to these requests which are on file with the Federal Communications Commission ("FCC" or "Commission") need not be produced. They may instead be identified by document title and date, the call letters of the station, or file numbers of the docket or application.

11. If any document requested is currently unavailable, an explanation should be provided as to why it is now unavailable.

limited to, bank statements, checks, and signature cards for any point after January 1, 1991.

7. All documents identifying the assets and/or liabilities of the following entities and/or individuals at any point after January 1, 1991: (1) Rita Reyna Brent, (2) Robert Brent, and (3) any other entity or individual that Brent is relying upon for funds to prosecute her application, construct her station, or operate her station.

8. All documents relating to any petitions in bankruptcy (voluntary or involuntary), bankruptcy proceedings, assignments for benefit of creditors, receivership proceedings, or any other similar proceeding relating to any individual or entity identified in Request 7.

9. All documents relating to lawsuits pending on or after January 1, 1985 in which monetary damages or other relief was sought against any individual or entity identified in Request 7.

10. All documents relating to the preparation of Section III of Brent's application.

CERTIFICATE OF SERVICE

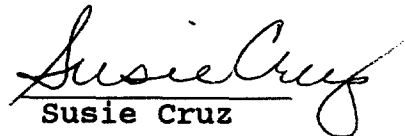
I, Susie Cruz, do hereby certify that on the 17th day of May 1993, a copy of the foregoing "Petition to Enlarge Issues" was sent first-class mail, postage prepaid to the following:

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Susie Cruz

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